Supreme Court, U.S.
FILED
OCT 27 1992
OFFICE OF THE CLERK

(7)

No. 91-1283

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

FRANK GREENBERG, Independent Executor of the Estate of John W. "Jack" McGann,

Petitioner,

—v.—

H & H MUSIC COMPANY, BROOK MAYS MUSIC COMPANY, and GENERAL AMERICAN LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

DONALD L. SKIPWITH
HELEN BRATTIN
Of Counsel
3212 Smith Street
Suite 102
Houston, Texas 77006
(713) 650-3300

JOSEPH J. GARCIA
Cooperating Attorney
SUZANNE B. GOLDBERG
THOMAS B. STODDARD
PAULA L. ETTELBRICK
EVAN WOLFSON
Counsel of Record

Lambda Legal Defense & Education Fund, Inc.
666 Broadway
New York, New York 10012
(212) 995-8585

Attorneys for Petitioner

October 27, 1992

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page:

DISCUSSION..... 1

1. The government's construction of Section 510 is inconsistent with the plain language of the statute..... 4

2. The government's and the Fifth Circuit's construction conflicts with decisions of other courts... 8

3. The Americans with Disabilities Act of 1990 offers no basis for denial of review.....11

CONCLUSION..... 13

TABLE OF AUTHORITIES

Cases:

Page:

Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231 (4th Cir. 1991)... 6

Dister v. Continental Group, Inc., 859 F.2d 1108 (2d Cir. 1988)..... 6, 9

Gavalik v. Continental Can Co., 812 F.2d 834 (3d Cir.), cert. denied, 484 U.S. 979 (1987)..... 7

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).....9

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)..... 7

Cases: Page:

Reichman v. Bonsignore, Brignati & Mazzotta, P.C., 818 F.2d 278 (2d Cir. 1987)..... 6

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983)..... 4, 5

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981).....10

Statutes: Page:

American With Disabilities Act of 1990, 42 U.S.C. §§12101 et. seq. (West Supp. 1991)..... 3, 11

Employee Retirement Income Security Act, 29 U.S.C. §1140.... passim

Miscellaneous: Page:

Foster Higgins, Health Care Benefits Survey 15 (1991)..... 1

Gladwell, When Benefits Changes Leave Employees Vulnerable, Wash. Post, Aug. 20, 1992, A1..... 1

He Thought He Had Insurance, Wash. Post, Oct. 19, 1992, A20..... 3

Pear, U.S. Is To Argue Employers Can Cut Health Insurance, N.Y. Times, Oct. 16, 1992, A1..... 3

Miscellaneous: Page:

Rublee, Self-Funded Health Benefit Plans, 255 JAMA 787 (1986).... 1

Tragic Case Shows Need for New Health Care Rules, U.S.A. Today, May 27, 1992, 8A..... 3

No. 91-1283

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

FRANK GREENBERG, Independent Executor of the Estate of JOHN W. "JACK" McGANN,

Petitioner,

v.

H & H MUSIC COMPANY, BROOK MAYS MUSIC COMPANY, and GENERAL AMERICAN LIFE INSURANCE COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF

Pursuant to Rule 15.7 of the Rules of the Court, petitioner submits this supplemental brief to address issues raised in the intervening brief filed by the United States.

DISCUSSION

This case raises an unresolved issue of extraordinary importance to millions of Americans, especially those who receive their health care through self-insured benefit plans offered by employers.[1] The

---

[1] A "self-insured" health benefit plan is one in which the employer assumes direct liability for the medical expenses of its employees. See generally Rublee, Self-Funded Health Benefit Plans, 255 JAMA 787 (1986). Although as recently as 1974 only five percent of American workers were covered by self-insured plans, today more than sixty percent of employees receive their health care through such plans. Gladwell, When Benefits Changes Leave Employees Vulnerable, Wash. Post, Aug. 20, 1992, at A1, A4. See also Foster Higgins, Health Care Benefits Survey 15 (1991).

issue is this: In enacting Section 510 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1140, prohibiting discrimination against plan beneficiaries, did Congress intend to allow employers absolute discretion to eliminate or reduce a worker's health benefits in response to the submission of claims for reimbursement, if the employer would save money based on the changes?

The United States concedes the significance of the issue, noting that this case "implicates health care policy issues of serious concern." U.S. Brief at 7. The public attention accorded the case underscores its importance.[2]

---

[2] The American Medical Association, the American Hospital Association, the United States Conference of Mayors, the American Association of Retired Persons, the American Bar Association and the National Commission on AIDS, among other groups, have all criticized publicly the

In justifying its recommendation that this Court not review the Fifth Circuit's decision, the United States argues that the court below correctly interpreted the meaning and scope of Section 510. Id. The United States also asserts that the decision "does not conflict with the decision of any other court." Id. at 8. Finally, the government contends that "the gravamen of the complaint" will be litigated in the future under the Americans with Disabilities Act of 1990,

---

ruling below and have urged the United States to recommend to this Court that it review the decision. See Pear, U.S. Is To Argue Employers Can Cut Health Insurance, N.Y. Times, Oct. 16, 1992, at A1, A18. The national press has also denounced the ruling below. See, e.g., He Thought He Had Insurance, Wash. Post, Oct. 19, 1992, at A20 (editorial characterizing this case as "intolerable"); Tragic Case Shows Need for New Health Care Rules, U.S.A. Today, May 27, 1992, at 8A (editorial asserting that the Fifth Circuit's decision "must not stand").

42 U.S.C. §12101 et seq. (West Supp. 1991) ("ADA"). Id. Petitioner respectfully submits that the first two assertions are demonstrably wrong and that the third offers no basis for denying review.

1. The government's construction of Section 510 is inconsistent with the plain language of the statute.

The United States focuses on a general overview of ERISA and Section 510, making the point that Section 510 was not intended to prohibit discrimination based on race or social animus. U.S. Brief at 10-11. That proposition is not relevant to this lawsuit.

The government also refers to Shaw v. Delta Airlines Inc., 463 U.S. 85 (1983), U.S. Brief at 7, 8, 15, in which the Court, considering preemption issues under ERISA, recognized an employer's broad discretion to set the terms of a welfare

benefit plan. Shaw, however, did not address in any sense the question of what limitations Section 510 places on such employer discretion. The United States answers that question with a resounding "none." Petitioner disagrees and submits that the Shaw Court's acknowledgment of ERISA's comprehensive protection for employees compels a conclusion opposite to that reached by the government. See Shaw, 463 U.S. at 90.

The government argues that an employer which shows that it is motivated to cut the benefits of one employee but not others by the desire to save money is immune from liability, unless the employee can show that the cost-saving justification is a pretext for some improper purpose. U.S. Brief at 12-15. That interpretation ignores the plain

language of Section 510. Section 510 prohibits discrimination based on exercise of any right under the plan. 29 U.S.C. §1140. Its meaning is evident: an employer may not reduce benefits discriminatorily because an employee, like McGann, has exercised his right under the medical plan to file his claims.

The ruling that an employer's desire to save money conclusively demonstrates the absence of discriminatory intent conflicts with the rulings of other appellate courts. See, e.g., Dister v. Continental Group, Inc., 859 F.2d 1108, 1115-16 (2d Cir. 1988).[3] The Third Circuit has reasoned that employer efforts motivated by a desire to cut the costs of

[3] See also Conkwright v. Westinghouse Elec. Corp., 933 F.2d 231, 239 (4th Cir. 1991); Reichman v. Bonsignore, Brignati & Mazzotta, P.C., 818 F.2d 278, 281 (2d Cir. 1987).

funding pensions or other benefits are "exactly th[e] type of conduct" Section 510 proscribes. Gavalik v. Continental Can Co., 812 F.2d 834, 857 n.39 (3d Cir.), cert. denied, 484 U.S. 979 (1987).

Section 510's language reflects Congress's desire to allow employers to cut pension costs or reduce benefit plans so long as the employer is not motivated by the particular claim of an employee. In other words, once the plaintiff has shown that his circumstances prompted the employer's adverse action, the employer must then prove that it did not cut benefits discriminatorily in response to the exercise of a right under the plan. See generally, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

The government's own illustration to promote its statutory construction

actually supports petitioner's point. No principled rationale exists for the argument underlying the government's suggestion that if McGann had exercised some right other than filing claims under the plan -- such as filing a claim for breach of fiduciary duty -- he might have prevailed by showing pretext. See U.S. Brief at 14. The government's concession is irreconcilable with its analysis, for Section 510 protects the exercise of rights under both ERISA and a benefit plan covered by ERISA. See 29 U.S.C. §1140.

2. The government's and the Fifth Circuit's construction conflicts with decisions of other courts.

The decision below, as well as the government's interpretation, is inconsistent with basic anti-discrimination law principles applied by other circuits in Section 510 cases.

In rejecting petitioner's reliance on McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) as the proper framework for analysis of this case and in refusing to recognize that an inference of intentional discrimination arises from the facts of this case, the Fifth Circuit deviated from the holdings of three other courts of appeals (and numerous district courts) that McDonnell Douglas and its progeny apply to Section 510. In circuits other than the Fifth Circuit, petitioner's showing would have been sufficient to establish discriminatory intent. See, e.g., Dister, 859 F.2d at 1114-15.

The Fifth Circuit's factual assumptions regarding defendants' motivation, which must be deemed true under Rule 56, negate the argument that there was insufficient evidence to create

a genuine issue of fact with respect to pretext. See U.S. Brief at 12. Indeed, one of the Fifth Circuit's errors lay in the court's disregarding its own assumption that the defendants' plan changes were motivated by petitioner's having filed claims and having revealed his illness to his employer. Upon the demonstration of a connection between petitioner's filing and the employer's facially discriminatory action, McDonnell Douglas and its progeny provide that the same evidence could establish pretext. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 255 n.10 (1981).

The United States urges that "common experience" dictates that there can be no reasonable inference of discrimination in this case. U.S. Brief at 13. To the contrary, common experience suggests that

H&H Music, distressed at having to incur the medical expenses of its employee, decided to curtail its obligation by altering its plan to assure McGann's elimination from coverage. Rather than undercutting petitioner's argument, common experience reinforces the inference that the retaliatory discrimination directed at McGann arose because he exercised his right to make claims under the plan. Such discrimination is precisely what Section 510 is meant to prohibit.

3. The Americans with Disabilities Act of 1990 offers no basis for denial of review.

The United States asserts that this case "is really about discrimination against persons with AIDS," and urges against review because, in its opinion, such discrimination "will undoubtedly be tested in cases arising under the

Americans with Disabilities Act of 1990 (ADA)." Id. at 17. However, the government states only that the relevance of the ADA "will... be tested," -- not that it would apply in these circumstances, or even that it should apply. Id.

This case is about discrimination against workers who seek to exercise their rights under an ERISA benefit plan, regardless of illness, and should be determined under ERISA. The government itself recognizes that a full understanding of the ADA section it cites may require years of litigation. Neither employees nor their employers -- and certainly not petitioner -- should be forced to await the eventual interpretation of an entirely different statute when the proper meaning of Section 510 compels resolution.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Donald L. Skipwith
Helen Brattin
Of Counsel
3212 Smith Street
Suite 102
Houston, TX 77006
(713) 650-3300

Joseph J. Garcia
Cooperating Attorney
Suzanne B. Goldberg
Thomas B. Stoddard
Paula L. Ettelbrick
Evan Wolfson
Counsel of Record

Lambda Legal Defense
& Education Fund, Inc.
666 Broadway
New York, NY 10012
(212) 995-8585

Attorneys for Petitioner

Dated: October 27, 1992